No. 01-1477

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Petitioners,

v.

MCI WORLDCOM NETWORK SERVICES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRITS OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed July 11, 2000]

Civil No. 1:CV-97-1857

MCI TELECOMMUNICATIONS CORP. and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
Plaintiffs,

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC. and
UNITED STATES DEPARTMENT OF JUSTICE,
Plaintiff-Intervenors,

v.

BELL ATLANTIC-PENNSYLVANIA, INC.; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,

Defendants.

AMENDING ORDER

On June 30, 2000 the court issued a memorandum of law and accompanying order disposing of the cross motions for summary judgment in the captioned action. Since that time, it has come to the court's attention that there is an inconsistency between the memorandum and the order with regard to Count I of Bell Atlantic Pennsylvania, Inc.'s counterclaim and crossclaim (the collocation issue). Accordingly, IT IS HEREBY ORDERED THAT the court's June 30, 2000 order

(Doc. 178) is AMENDED such that Paragraph 2 of the order should read, in relevant part, as follows:

> (2) MCI's motion for summary Judgment on Counts I through III of Bell's counterclaim is granted in part and denied in part as follows:
>
> > (a) The motion is granted as to Count I. The PUC's decision regarding MCI's collocation of its remote switching modules in Bell's central offices is affirmed.

The order remains as originally written in all other respects.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: July 11, 2000.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 30, 2000]

Case No: 1-97-CV-1857

MCI TELECOMMUNICATION CORP. and
MCI METRO ACCESS TRANSMISSION SERVICES,
Plaintiff,

AT & T COMMUNICATIONS OF PENNSYLVANIA, INC. and
UNITED STATES DEPARTMENT OF JUSTICE,
Plaintiff-Intervenors,

v.

BELL ATLANTIC-PENNSYLVANIA, INC.; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of the Pennsylvania Public Utility Commission and MCI Telecommunications Corp., on

Count I of Bell Atlantic-Pennsylvania, Inc's. Crossclaim and Counterclaim, and against Bell Atlantic-Pennsylvania, Inc.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of Bell Atlantic-Pennsylvania, Inc., and against, MCI Telecommunications Corp., and the Pennsylvania Public Utility Commission, on Count 11 of Bell Atlantic-Pennsylvania Inc's. Crossclaim and Counterclaim.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of MCI Telecommunication Corp., AT&T Telecommunications of Pennsylvania, Inc. and the Pennsylvania Public Utility Commission, and against Bell Atlantic-Pennsylvania Inc., on Count III of Bell Atlantic-Pennsylvania Inc's. Crossclaim and Counterclaim.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of MCI Telecommunications Corp., and against, Bell Atlantic-Pennsylvania Inc., and the Pennsylvania Public Utility Commission, on Counts III, IV, V; and in favor of AT&T Communication of Pennsylvania, Inc., and against MCI Telecommunications Corp., on Count VI of MCI Telecommunications Corp's. Claims.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment be and is hereby ordered in favor of MCI Telecommunication Corp. and AT&T Telecommunications of Pennsylvania, Inc, and against the Pennsylvania Public Utility Commission and Bell Atlantic-Pennsylvania, Inc. on Count VI of MCI Telecommunications Corp's. Claims.

Mary E. D'Andrea, Clerk of Court

/s/ Mark J. Armbrister
(By) MARK J. ARMBRISTER, Deputy Clerk

Date: June 30th, 2000

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 30, 2000]

Civil No. 1:CV-97-1857

MCI TELECOMMUNICATIONS CORP. and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
Plaintiffs,

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC.
and UNITED STATES DEPARTMENT OF JUSTICE,
Plaintiff-Intervenors,

v.

BELL ATLANTIC-PENNSYLVANIA INC; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,
Defendants.

ORDER

In accordance with the foregoing memorandum of law, IT IS HEREBY ORDERED THAT the Report and Recommendation of Magistrate Judge Durkin is ADOPTED IN PART AND REJECTED IN PART as follows:

(1) MCI's motion for summary judgment on Counts III through VI of its complaint is granted in part as follows:

(a) The motion is granted as to Counts III and IV. The matter is remanded to the PUC to reform the interconnection agreement to reflect that Bell shall

provide MCI with access to the loop distribution element and its dark fiber.

(b) The motion is granted as to Count V. The matter is remanded to the PUC to reform the interconnection agreement to permit MCI to interconnect with Bell at one point in each local access and transport area.

(c) The motion is granted as to Count VI. The matter is remanded to the PUC to reconsider its decision regarding pricing of unbundled network elements in accordance with the current law and regulations.

(2) MCI's motion for summary judgment on Counts I through III of Bell's counterclaim is granted in part and denied in part as follows:

(a) The motion is granted as to Count I. The matter is remanded to the PUC to reform the interconnection agreement to permit MCI to collocate its remote switching modules in Bell's central offices.

(b) The motion is granted as to Count III. The PUC's decision regarding the wholesale pricing discount applicable to MCI's resale of Bell services is affirmed.

(c) The motion is denied as to Count II. The matter is remanded to the PUC to reform the interconnection agreement to reflect that Bell is not required to sell MCI its directory publishing services at a wholesale discount.

(3) The PUC's motion for summary judgment on Counts III through VI of MCI's complaint is denied, in accordance with paragraph (1) of this order.

(4) The PUC's motion for summary judgment on Counts I through III of Bell's counterclaim is granted in part and denied in part as follows:

(a) The motion is granted as to Counts I and III, in accordance with paragraph (2)(a) and (b) of this order.

(b) The motion is denied as to Count II, in accordance with paragraph (2)(c) of this order.

(5) Bell's motion for summary judgment as to Counts III through VI of MCI's complaint is denied, in accordance with paragraph (1) of this order.

(6) Bell's motion for summary judgment as to Counts I through III of its crossclaim and counterclaim is granted in part and denied in part as follows: (a) The motion is granted as to Count TI, in accordance with paragraph (2)(c) of this order.

(a) The motion is granted as to Count II, in accordance with paragraph (2)(c) of this order.

(b) The motion is denied as to Counts I and III, in accordance with paragraph (2)(b) of this order.

(7) AT&T's motion for summary judgment is granted as follows:

(a) The motion is granted as to Count VI of MCI's complaint, in accordance with paragraph (1)(c) of this order.

(b) The motion is granted as to Count III of Bell's counterclaim and crossclaim, in accordance with paragraph (2)(b) of this order.

(8) Count II of MCI's complaint is deemed withdrawn.

(9) The Clerk of Court shall enter judgment and remand the captioned action consistent with this order and close the file.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: June 30 , 2000.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed June 30, 2000]

Civil No. 1:CV-97-1857

MCI TELECOMMUNICATIONS CORP. and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
Plaintiffs,

AT&T COMMUNICATIONS OF PENNSYLVANIA, INC. and
UNITED STATES DEPARTMENT OF JUSTICE,
Plaintiff-Intervenors,

v.

BELL ATLANTIC-PENNSYLVANIA, INC.; PENNSYLVANIA PUBLIC UTILITY COMMISSION; and JOHN M. QUAIN; ROBERT K. BLOOM; JOHN HANGER; DAVID W. ROLKA; NORA MEAD BROWNELL, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission,
Defendants.

MEMORANDUM

Before the court are objections filed to the September 16, 1999 report and recommendation ("R&R") of Magistrate Judge Durkin regarding the crossmotions for summary judgment filed by the following parties: (1) Defendant Bell Atlantic-Pennsylvania ("Bell");[1] (2) Plaintiff MCI Tele-

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[1] Bell filed motions for summary judgment in favor of its crossclaims and counterclaims and in opposition to all issues raised in the complaints of MCI and AT&T.

communications Corp. ("MCI");[2] (3) Plaintiff-Intervenor AT&T Communications of Pennsylvania, Inc. ("AT&T"); and Defendants Pennsylvania Public Utility Commission and its commissioners (hereinafter collectively referred to as "PUC"). Specifically, objections were filed by Bell and the PUC. The issues have been briefed by the parties,[3] and the matter is ripe for disposition.

I. *Background*

The instant case arises out of decisions by the PUC implementing the local competition provisions of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. §§ 251-261. Both MCI and Bell have filed claims challenging certain aspects of an agreement between them that was arbitrated and approved by the PUC, pursuant to the Act.

A detailed factual background is set forth in Magistrate Durkin's R&R and the documents referenced therein. Therefore, in the interest of brevity, the court will incorporate the R&R's background by reference.

A. *Report and Recommendation*

In his R&R, Magistrate Durkin recommended that the summary judgment motions of MCI, Bell, the PUC and AT&T be granted in part and denied in part as follows:

> MOTIONS OF MCI FOR SUMMARY JUDGMENT
>
> 1. With regard to MCI's request for unbundled access to the loop distribution element, this matter be remanded to the PUC with directions to reform the interconnection agreement to reflect that Bell had not sustained its burden to show technical infeasibility with regard to

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[2] MCI filed motions for summary judgment both in favor of its claims and in opposition to all of Bell's crossclaims and counterclaims.

[3] In addition to the briefs filed by the parties in support and opposition the objections to the R&R, an amicus curiae brief was filed by the United States of America, Federal Communications Commission ("FCC").

unbundled access to the loop distribution element, and to apply the "impairment" standard as reinterpreted by the FCC;

2. With respect to MCI's request of access to dark fiber, this matter be remanded to the PUC with directions to reform the interconnection agreement to reflect dark fiber is a network element and to apply the impairment standard as reinterpreted by the FCC;

3. With respect to MCI's request for access to Bell's directory assistance database, this issue be dismissed as moot;

4. With respect to the issue regarding the PUC's decision to require MCI to interconnect with Bell in each access tandem serving area, judgment be entered in favor of MCI and against the PUC and Bell, and this matter be remanded to the PUC with directions to reform the interconnection agreement to permit MCI to interconnect with Bell at one point in each local access and transport area;

5. With respect to the issue regarding the PUC's pricing decision, this matter be remanded to the PUC with direction that the PUC reconsider its decision in light of the FCC rules.

MOTIONS OF BELL FOR SUMMARY JUDGMENT ON ITS CROSSCLAIM AND COUNTERCLAIM

1. With respect to the issue regarding the PUC's decision to allow MCI to collocate remote switching modules in Bell's central office, judgment be entered in favor of the PUC and MCI and against Bell;

2. With respect to the issue regarding the PUC's decision to require Bell to sell MCI its directory publishing services at wholesale discount judgment be entered in favor of the PUC and MCI and against Bell;

3. With respect to the issue regarding the PUC's decision in setting the wholesale discount applicable to MCI's resale of Bell services, this matter be remanded to the PUC with direction to reconsider its decision on this issue after the Eighth Circuit, on remand from the Supreme Court, has considered whether the-FCC's rules and methodology comport with the Act.

MOTION OF THE PUC FOR SUMMARY JUDGMENT

1. Since the PUC's motion relates to every issue raised in the motions for MCI and Bell, judgment be entered or in the issues be remanded to the PUS, as set forth above in connection with the motions of MCI and Bell.

MOTION OF AT&T FOR SUMMARY JUDGMENT

1. Since AT&T's intervention in this case and its motion for summary judgment relates only to the pricing issues, this matter be remanded to the PUC as set forth above in connection with the motions of MCI and Bell. (R&R at 48-50.)

B. *Objections to the Report and Recommendation*

Objections were filed by Bell and the PUC as follows:

1. *Bell's Objections*

With regard to the parties' cross-motions for summary judgment relating to MCI's claims, Bell objects to Magistrate Durkin's R&R on the following issues: (1) remand of MCI's request for unbundled access to the Loop distribution element (Count III) to the PUC; (2) determination that dark fiber is a "network element" as defined in the Act, and remand of MCI's request for unbundled access to Bell's dark fiber (Count IV) to the PUC; (3) entry of judgment in favor of MCI on its request to reverse the PUC's decision to require MCI to interconnect with Bell's network in each access tandem

serving area and to permit MCI to interconnect at one point in each local access and transport area ("LATA") (Count V); and (4) remand of PUC's pricing decision with regard to unbundled network elements ("'UNE") to the PUC with the direction that the PUC reconsider its decision in light of the FCC rules which were reinstated by the Supreme Court in *AT&T Corporation v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

With regard to the parties' cross-motions for summary judgment relating to Bell's crossclaims and counterclaims, Bell objects to Magistrate Durkin's R&R on the following issues: (1) entry of judgment in favor of PUC and MCI, and against Bell, on Bell's request to prohibit MCI from collocating its remote switching modules ("RSMs") in Bell's central offices (Count I); (2) entry of judgment in favor of PUC and MCI, and against Bell, on Bell's request to reverse the PUC's decision to require Bell to sell MCI its directory publishing services at wholesale discount (Count II); and (3) remand of Bell's request to reverse the PUC's wholesale discount pricing decision applicable to MCI's resale of Bell services (Count III).

2. *PUC's Objections*

The PUC joins in Bell's Objections, with the exception of Magistrate Durkin's R&R as to Count I and II of Bell's Crossclaim. and Counterclaim. Additionally, PUC objects to the standard of review employed by Magistrate Durkin.

II. *Discussion*

The court will consider the portions of Magistrate Durkin's R&R to which objections were filed in turn.

A. *Standard of Review (PUC)*

Contrary to the PUC's current protestations, in his R&R, Magistrate Durkin identified the appropriate standard of review for evaluating the PUC's decision. It is well-settled

that a state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statues. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (citations omitted). Therefore, the PUC's interpretations of the Act are to be reviewed *de novo*. The PUC's factual determinations are, however, accorded a degree of deference; they are to be reviewed under a substantial evidence standard.[4] *Id.; see also Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266-67 (9th Cir. 2000). As such, the court rejects the PUC's objections to Magistrate Durkin's standard of review.

B. *Unbundling of Dark Fiber and Subloops*

The PUC and Bell initially objected to Magistrate Durkin's R&R on the issues of Dark Fiber and Subloop unbundling. However, the respective arguments on these issues have been mooted by the FCC's November 5, 1999 order[5] which addresses, inter all' a these very issues. *See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98, Third Report and Order (Rel. Nov. 5, 1999) (hereinafter "UNE Remand Order").

Specifically, with respect to subloop unbundling, the UNE Remand Order states that incumbent local exchange carriers ("incumbent LECs") "must provide unbundled access to

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[4] Magistrate Durkin indicated that "the PUC's Finding[s] of Fact are entitled to deference and must be reviewed under an arbitrary and capricious standard," citing *GTE South, Inc. v. Morrison*, 6 F. Supp.2d 517 (E.D. Va.1998). (R&R at 10.) The court notes, as did the Fourth Circuit in *GTE South, Inc.* that "there is no meaningful difference between [the arbitrary and capricious] standard and the substantial evidence standard." *GTE South, Inc.*, 199 F.3d at 745 n.5.

[5] The PUC and Bell filed their objections to the R&R and supporting briefs on October 19, 2000-before the FCC's order was released.

subloops nationwide, where technically feasible," *id.* ¶ 205, and that "lack of access to unbundled subloops at technically feasible points throughout the incumbent's loop plant will impair a competitor's ability to provide service that it seeks to offer." *Id.* ¶ 209. With regard to dark fiber, the UNE Remand Order states "dark fiber meets the statutory definition of a network element, and therefore is included within the definition of the dedicated interoffice transport network element," *id.* ¶ 326, and that "lack of access to unbundled interoffice transport impairs a carrier's ability to provide the services it seeks to offer." *Id.* ¶ 332.

Because the UNE Remand Order is binding upon the parties, the court need not evaluate the initial objections raised by Bell and the PUC to Magistrate Durkin's R&R on these issues. Indeed, the UNE Remand Order essentially moots the R&R in this regard. Nevertheless, the court will direct that judgment be entered consistent with the recommendations of Magistrate Durkin on these issues, albeit upon different grounds.

C. *Collocation of RSMs*

Bell initially objected to Magistrate Durkin's recommendation that judgment be entered against Bell on its request to overturn the PUC's decision to require that Bell permit MCI to collocate its remote switching modules ("RSMs") in Bell's central office. In so objecting, Bell contended that Magistrate Durkin applied the incorrect standard of review in affirming the PUC's decision insofar as he stated that "it was within the discretion of the PUC to permit collocation of RSMs." (R&R at 44.) To the contrary, Bell contended, Magistrate Durkin should have reviewed the PUC's decision *de novo*, because it was based upon a legal conclusion—*i.e.*, the interpretation of the word "necessary," as defined in the Act.

In response to Bell's objection, MCI points to a March 31, 1999 FCC order which addresses the collocation issue and, apparently, forecloses Bell's objections. *See In re: Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 4761 (1999) (rel. March 31, 1999), ¶ 28. Thus, in its reply brief, Bell appears to withdraw its objection on this issue, acknowledging that the FCC order cited by MCI is a currently binding regulation which Bell is obliged to honor. In addition to the FCC order cited by Bell, the court notes Bell's objections are also foreclosed by other FCC regulations. See 47 C.F.R. §§ 51.323(b), (c) (effective June 1, 1999).[6] In applying these new regulations in a case which post-dates the parties' briefs on the objections, the Fourth Circuit held that 47 C.F.R. § 51.323 plainly requires incumbent LECs to allow competing LECs to collocate RSMs and prohibits the incumbent from requiring that the switching functions of the RSMs be disabled. *See AT&T Communications of Virginia, Inc. v. MCI*, 197 F.3d 663, 669-70 (4th Cir. 1999).

Therefore, the court will adopt Magistrate Durkin's recommendation that the PUC's decision regarding collocation of RSMs be upheld, albeit upon different grounds. Accordingly, the court will direct that judgment be entered against Bell,

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[6] Pursuant to 47 C.F.R. § 51.323(b), "[a]n incumbent LEC shall permit the collocation of any type of equipment used or useful for interconnection or access to unbundled network elements." Further, § 1.323(c) provides, in relevant part, that:

> an incumbent may not place any limitations on the ability of requesting carriers to use all the features, functions, and capabilities of equipment collocated pursuant to paragraph (b) of this section, including, but not limited to, switching and routing features and functions.

47 C.F.R. § 51.323(c).

and in favor of the PUC and MCI, on Count I of Bell's Crossclaim. and Counterclaim.

D. *Unbundled Network Element Pricing*

The court now turns to the first of four issues in Magistrate Durkin's R&R over which considerable dispute remains: The PUC's decision regarding the pricing of unbundled network elements ("UNEs"). In its complaint (Count VI), MCI alleges that the PUC's pricing decision is violative of the Act insofar as the rates for UNEs must be based on forward looking economic costs and that the PUC's reliance upon Bell's cost studies was in error since those cost studies were not forward looking and included assumptions and inputs that are inconsistent with forward looking pricing, such as embedded costs and inefficiencies, costs associated with investment unrelated to providing local telephone service, and other inflated inputs that reflected monopoly pricing rather than forward looking costs. AT&T joined MCI in its attack on the PUC's pricing decision.

Magistrate Durkin recommends remanding the pricing issue to the PUC so that it may reconsider its pricing decision in accordance with the provisions of the FCC's recently revived regulations on this issue. *See* 47 C.F.R. §§ 51.501 *et seq*. In so recommending, Magistrate Durkin acknowledged that the aforementioned FCC pricing regulations were not in effect at the time of the PUC's decision (they had been vacated by the Eighth Circuit in a direct review action pursuant to the Hobbs Act, 28 U.S.C. § 2842(1)).[7] However, in light of the Supreme Court's decision reversing the Eighth Circuit's vacation of the FCC's pricing rules, *see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), Magistrate Durkin concluded that a remand is the appropriate course of

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[7] *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir.1997), *rev'd in part*, 525 U.S. 366 (1999).

action to ensure that the PUC's pricing decision comports with the FCC's rules, and thus with the Act.

Bell and the PUC object to Magistrate Durkin's recommendation on this issue. Both objecting parties contend that the pricing methodology employed by the PUC was not inconsistent with the FCC's pricing rules, which require the use of the TELRIC [8] pricing methodology. Alternatively, Bell argues that even if the PUC's pricing methodology is inconsistent with TELRIC, it nevertheless complies with the Act-that is, the PUC is not bound by the FCC's pricing rules (*i.e.*, the requirement to employ the TELRIC methodology) because they were not binding at the time of the PUC decision. The court will address each of these objections separately.

Bell's contention that the PUC is not constrained by the FCC's regulation requiring use of the TELRIC pricing methodology is wholly unpersuasive. While it is undisputed that the FCC's regulations were stayed at the time of the PUC's decision, its decision is nevertheless subject to review for compliance with those regulations which were eventually upheld as valid by the Supreme Court. Generally, the Supreme Court's interpretation of a law "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harder v. Virginia Dept of Taxation*, 509 U.S. 86, 97 (1993). Contrary to Bell's arguments, there are no retroactivity concerns implicated by application of the FCC's pricing rules to the instant challenge. Indeed, this situation is directly analogous to one which the Fourth Circuit recently faced in the case of *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999),

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[8] TELRIC is an acronym for Total Element Long Run Incremental Cost, which is a term of art referring to the costs incurred to provide increased quantities of a service, above those already incurred to provide service, in response to increased demand over the long run. *See* 47 C.F.R. § 51.505.

wherein the court determined that "there [were] no retroactivity principles that prevent[ed] [it] from applying the FCC's pricing rules." *Id.* at 741. Accordingly the court rejects Bell's contention that the PUC was not bound by FCC's pricing rules and thus, the TELRIC methodology, in reaching its decision on the issue of UNE pricing.

The court next turns to the parties' arguments that the pricing methodology utilized by the PUC was not inconsistent with the FCC's TELRIC methodology and thus, violative of the Act. The PUC admits that it did not strictly comply with the TELRIC methodology, and instead employed a similar methodology known as TSLRIC.[9] Nevertheless, the PUC contends that the differences between TSLRIC and TELRIC are immaterial, and thus "[a] remand forfurther review on this esoteric point is not appropriate." (PUC Br. at 13.) Specifically, the PUC asserts that the principal distinction between TELRIC and TSLRIC lies in the calculation of forward looking common/joint costs,[10] and argues, in conclusory fashion, that "in practice, there may be no discernable difference at all." (*Id.*) For the reasons set forth below, the court finds such arguments unpersuasive.

The PUC's contention that its decision was in accordance with TELRIC is belied both by the FCC's express adoption of TELRIC and by the PUC's express adoption of TSLRIC. *See In re: Application of MFS Intelenet of Pennsylvania, Inc.*, Docket No. A-31023F0002, ("MFS III"), Order of April 10, 1997, at 20 (JA001641). Although the PUC stated that it found the FCC's pricing rules "to be instructive and a reasonable guide in determining a proper application of long-run

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[9] TSLRIC is an acronym for Total Service Long-Run Incremental Cost.

[10] Indeed, the PUC admits that the FCC has indicated that under the TELRIC method, "the amount of joint and common costs that must be allocated among separate offerings is likely to be much smaller . . . than a TSLRIC approach that measures the costs of conventional services." (*See* PUC Br. at 11 (citing the FCC's Local Competition Order at ¶ 678).)

incremental cost methodology," (*id.*), it disavowed them as not mandatory. (*Id.* at 13 (JA001634).) Thus, the PUC baldly asserted that the FCC's pricing rules were consistent with the TSLRIC methodology, which was utilized by the PUC (and proposed by Bell) in a previous proceeding, and that it was "not persuaded that the Hatfield study [sponsored by AT&T and MCI] offers a superior alternative to the Bell sponsored study." (*Id.* at 20 (JA 001641).) Indeed, in the absence of more than self-serving statements regarding TSLRIC's consistency with the FCC's pricing rules or possibility that TELRIC and TSLRIC do not differ in practice, the court is unpersuaded that the PUC's decision was appropriately based upon the TELRIC methodology set prescribed by the FCC's pricing rules. Therefore, the court agrees with Magistrate Durkin's recommendation that this issue be remanded to the PUC for reconsideration in light of the FCC's undisputedly governing pricing rules.

Despite the plain wording of the PUC's April 10, 1997 order and its admissions to the contrary, Bell curiously contends that the PUC did, in fact, utilize the TELRIC methodology. This argument, however, falls flat in the face of the admissions of the PUC discussed above. Accordingly, the court will adopt Magistrate Durkin's R&R as to this issue.[11]

E. *Interconnection: Access Tandem v. LATA*

Bell and the PUC object to Magistrate Durkin's recommendation to grant summary judgment in favor of MCI on its claim seeking reversal of the decision of the PUC, wherein

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[11] In further support of Magistrate Durkin's recommendation, the court notes that, as MCI points out, the PUC's "Global Order" issued September 30, 1999 appears to contradict several of the input cost factors used in the UNE pricing decision currently at issue. *See Joint Petition of Nextlink Penn., Inc.*, No. P-00991648 Opinion and Order, (entered Sept. 30, 1999). Therefore, for this reason, it also appears that a remand of the instant issue to the PUC for reconsideration in conjunction with the FCC's pricing rules is appropriate.

the PUC required MCI to interconnect with Bell's network in each access tandem serving area. Magistrate Durkin concluded that the PUC's decision to require interconnection at more points than requested by MCI is contrary to the provision of the Act prescribing interconnection, 47 U.S.C. § 251(c)(2)(B), and the corresponding regulations, 47 C.F.R. § 51.305. According to Bell and the PUC, because neither the Act nor the corresponding regulations proscribe a state commission from requiring interconnection at more than one access point per local access transport area ("LATA"), it was within the PUC's sole discretion to determine a minimum number of access points for interconnection. The court disagrees.

Magistrate Durkin's R&R contains a thorough, well-reasoned discussion of this issue. Clearly, the Magistrate adopted the interpretation of the Act proffered by MCI, and thus rejected the interpretation proffered by Bell and the PUC. Because the court agrees with the interpretation set forth by Magistrate Durlcin, further discussion is unnecessary.[12] Magistrate Durlcin's R&R will be adopted; therefore, the court will order that summary judgment be entered in favor of MCI, and against Bell and the PUC on Count V of MCI's complaint.

F. *Wholesale Discount: Directory Publishing, Services*

In Count II of its Crossclaim and Counterclaim, Bell seeks reversal of the PUC's decision to require Bell to provide MCI

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[12] The court notes Magistrate Durkin's conclusion on this issue has been bolstered by the affirmance of a decision upon which he relied: On October 8, 1999, the Ninth Circuit issued an opinion in *U.S. West Communications, Inc. v. MFS Intelenet*,193 F.3d 1112 (9th Cir 1999), affirming *U.S. West Communications, Inc. v. MFS Intelenet*, No. C97-222WD,1998 WL 350588 (W.D. Wash. January 7, 1998). Although the *MFS Intelenet* court does not address the instant issue directly, its affirmance implicitly undermines the rationale of the district court decisions cited by Bell—all of which are within the Ninth Circuit.

with certain directory publishing services at wholesale, rather than tariff (*i.e.*, retail) cost. Bell claims that the PUC incorrectly interpreted the term "telecommunication service," as defined in the Act, to encompass the provision of directory publishing services, thereby imposing upon Bell the duty to offer such services to MCI for resale at wholesale rates, pursuant to 47 U.S.C. § 251(c)(4)(A).[13] Magistrate Durkin agreed with the PUC's interpretation and therefore recommends that the PUC's decision be affirmed. Bell objects to Magistrate Durkin's recommendation, arguing, once again, that directory publishing services do not fit within the Act's definition of "telecommunication services."

The Act defines "telecommunications service" as follows: "the offering of telecommunications for a fee directly to the public, or to such classes or users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). In turn, the Act's definition of "telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Following the reasoning of the PUC, Magistrate Durkin interpreted the Act's definition of "telecommunications service" broadly,[14] and concluded that such services include directory publishing services. Magistrate Durkin appears, however, to have afforded too

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[13] Under the Act, an Incumbent LEC has "[t]he duty. . . to offer for resale at wholesale rates any telecommunications service that the tamer provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

[14] Magistrate Durkin cites the case of *U.S. West Communications v. MFS Intelenet*, No. 97-222,1998 WL 350588 (W.D. Wash. Jan. 7, 1998), for the proposition that "the definition of 'telecommunication service' is broad." (R&R at 46 (citing *MFS Intelenet* at *4).)

much deference to the PUC's decision,[15] and for the reasons set forth below, the court will reject his recommendation on this issue.

The court believes that the plain meaning of the Act's definition of "telecommunications service" cannot be stretched to include directory publishing services. The court first notes that Magistrate Durkin's citation to *MFS Intelenet* is misplaced. While that case does state that "[t]he definition of telecommunications services is broad," *id.* 1998 WL 3500588, at *4, its statement in no way supports the inclusion of directory listing services as within such definition. Contrary to the reasoning of the PUC and Magistrate Durkin, the court is unpersuaded that the inclusion of a subscriber's telephone number in the transmission path necessarily brings all "services provided in relation to that number" within the statutory definition of "telecommunications services." (R&R at 46.) As Bell pointed out in its objection to Magistrate Durkin's R&R, "[i]f Congress intended the wholesale discount to apply to any and all retail service included in the [incumbent LEC's] tariff, it would have said so." (Bell Br. at 12.)

The court is equally unpersuaded by the alternative ground upon which Magistrate Durkin concluded that directory listing services must be construed as "telecommunications services"—that the FCC's Local Competition Order [16] "expressly [holds] that the state commissions can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs." (R&R at 47 (citing Local Comp. Ord ¶ 872).) The court believes that

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[15] As explained in Section II(A)*supra*, the court must review the PUC's interpretation of the Act *de novo*. *See Morrison*, 199 F.3d at 745.

[16] *See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996) (hereinafter "Local Competition Order").

when the portion of the Local Competition Order relied upon by Magistrate Durkin is read in its entirety, it provides little support for the conclusion he reached. In the paragraph immediately preceding the one cited by Magistrate Durkin, the FCC emphasizes that "an [Incumbent LEC] must establish a wholesale rate for each retail service that: (1) *meets the statutory definition of 'telecommunication service*;' and (2) is provided at retail to subscribers who are not 'telecommunications carriers.'" *Local Competition Order* ¶ 871 (emphasis added). Indeed, the FCC declined to prescribe a minimum list of services that are subject to § 251(c)(4)'s resale requirement, but instead merely suggested a method for state commissions to use in determining whether a particular service should be offered at wholesale rates. Nevertheless, a state commission's determination of whether a service meets the statutory definition of "telecommunication service" is not entitled to deference, but is instead reviewed *de novo*. *See Morrison*, 199 F.3d at 745. Therefore, to the extent that Magistrate Durkin relied upon the PUC's determination on this issue, his recommendation is flawed.

Upon consideration of the statutory definition of "telecommunication service," the court believes that the PUC's and Magistrate Durkin's interpretation of is strained. The plain meaning of the Act cannot support the inclusion of directory publishing services as telecommunications services, and, therefore, the PUC erred by requiring Bell to provide such services to MCI at wholesale for this reason. Therefore, the court will reject Magistrate Durkin's recommendation on this issue, and enter summary judgment in favor of Bell and against MCI and the PUC on Count II of Bell's Crossclaim and Counterclaim.

G. *Wholesale Discount Pricing Applicable to MCI's Resale of Bell Services*

In Count III of its Counterclaim/Crossclaim, Bell seeks to reverse the PUC's decision regarding the wholesale discount

rate applicable to MCI's resale of Bell's services. Magistrate Durkin concluded that because the Eighth Circuit is currently considering the merits of the FCC's wholesale discount pricing rules on remand from the Supreme Court,[17] this issue should be remanded to the PUC for reconsideration of its decision following the Eighth Circuit's decision.

It is undisputed by the parties that the PUC's decision with regard to wholesale pricing is consistent with the FCC regulations. However, Bell maintains that the FCC regulations are contrary to the Act. Because Bell's argument goes to the very issue which sits before the Eighth Circuit on remand, Bell seeks to have the decision in the instant case held in abeyance pending the Eighth Circuit's ruling. The remaining parties oppose this request and thus also oppose Magistrate Durkin's, recommendation, arguing that such action is improper in light of the fact the PUC's decision is undisputedly consistent with the FCC's currently binding regulations. The court agrees.

Clearly, to the extent that Bell seeks to challenge the substantive provisions of the FCC regulations governing this issue, it is not a proper action before this court. *See Morrison*, 199 F.3d at 743 (acknowledging that the Eighth Circuit has been assigned as the sole forum to hear the petitions for review of FCC regulations, pursuant to 28 U.S.C. § 2112(a)). Thus, at this point, Bell's claim appears to be premature. Because Bell admits that the PUC's decision is consistent with the FCC regulations, it cannot maintain a claim against the PUC for violating the Act on the basis that the regulations may, at some point in the future, be vacated.

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[17] As indicated by Magistrate Durkin, the Supreme Court ruled on the jurisdictional issue regarding the FCC pricing rules, but declined to address the challenges to the merits of the rules. *See Iowa Utilities Bd.*, 525 U.S. 366. Instead, the case was remanded to the Eighth Circuit for consideration of the merits. *See id.* To date, the Eighth Circuit has not issued and opinion.

Moreover, the court is unconvinced that holding the instant issue in abeyance pending the Eighth Circuit's decision will serve a useful purpose. Indeed, regardless of the Eighth Circuit's holding, the issue of whether the regulations comport with the Act is likely to remain unresolved until it is finally considered by the Supreme Court. Thus, the court believes that issuing a ruling on Bell's claim in light of the existing law is appropriate—particularly in light of Congress's intent that competition under the [Act] take root 'as quickly as possible.'" *Morrison*, 199 F.3d at 744 (quoting H.R.Rep. No. 104-204 at 89 (1995)). Facing a similar question, the Fourth Circuit recently declined to hold an appeal from a state commission ruling in abeyance, stating that:

> [w]ithholding our decision until the Eighth Circuit and (perhaps) the Supreme Court review the validity of the FCC's rules could result in a considerable delay. Issuing the opinion without delay is consistent with Congresses' express policy to bring about competition quickly m the local telephone markets.

Id. Accordingly, the court will reject Magistrate Durkin's recommendation on this issue, and enter summary judgment against Bell, and in favor of MCI and the PUC on Count III of Bell's Crossclaim and Counterclaim.

III. *Conclusion*

In accordance with the foregoing discussion, the court will adopt in part and reject in part the Report and Recommendation issued by Magistrate Judge Durkin. With regard to MCI's claims, the court will direct that judgment be entered as follows: in favor of MCI, and against Bell and the PUC, on Counts III, IV, V, and VI; and in favor of

AT&T on Count VI.[18] With regard to Bell's crossclaims and counterclaims, the court will direct that judgment be entered as follows: in favor of MCI and the PUC, and against Bell, on Counts I; in favor of MCI, the PUC, and AT&T on Count III; and in favor of Bell, and against MCI and the PUC, on Count II. An appropriate order will issue.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: June 30, 2000.

[18] The court notes that conspicuously absent from the parties' summary judgment briefs is argument as to Count II of MCI's complaint, although MCI and Bell purportedly moved for summary judgment as to all counts in MCI's complaint. Although a review of the docket does not reveal that this Count was dismissed, because the parties have apparently dropped this issue, the court will deem Count II of MCI's complaint withdrawn.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
[Filed Nov. 5, 1998]

Civil Action No. 1:CV-97-1857
(Judge Caldwell)
(Magistrate Judge Durkin)

MCI TELECOMMUNICATIONS CORP.,
Plaintiff,

vs.

BELL ATLANTIC-PENNSYLVANIA, INC., *et al.*,
Defendants.

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

In this case, the plaintiff MCI seeks review of determinations of the defendant, the Pennsylvania Public Utility Commission (PUC), regarding an agreement between MCI and defendant Bell Atlantic-Pennsylvania, Inc., for entry of MCI into the local telephone market. Our jurisdiction over the controversy is under The Telecommunications Act of 1996. *See* 47 U.S.C. § 252(e)(6).

The PUC defendants filed motions to dismiss the complaint against them and a crossclaim filed by defendnat, Bell Atlantic-Pennsylvania. The motions raised the tenth and the eleventh amendments, as well as a commerce-clause challenge to the Act.

The magistrate judge has filed a report recommending that the PUC's motions to dismiss be denied, and we are considering the objections to the report, the principal one being that the magistrate judge did not adequately cover the coercive aspect of the Act in light of the tenth amendment.

As to the tenth and eleventh amendment challenges, they can be disposed of by reference to *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998), and cases cited therein.

In connection with the commerce-clause challenge to the Act, we are not satisfied by the conclusional challenge made by the defendants. Congress can regulate intrastate commerce as ion as that commerce substantially affects interstate commerce. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). Thus, simply because intrastate telephone connections were always traditionally regulated by the states does not mean that Congress could not exert commerce-clause power over them.

Upon review of the Report of the United States Magistrate Judge, filed on August 11, 1998, and full consideration of the exceptions thereto filed by the defendants, the Pennsylvania Public Utility Commission and its members, for the reasons stated in the Report by Magistrate Judge Durkin we agree the motions to dismiss filed by said defendants should be denied, and we adopt the reasoning and conclusions of the Report and Recommendation.

Accordingly, this 5th day of November, 1998, it is ordered that:

1. The motions to dismiss of the PUC and its member (doc. 7 and 19) filed against the plaintiff's complaint and the crossclaim of defendant, Bell Atlantic-Pennsylvania, are denied.

2. This case is remanded to the Magistrate Judge for further proceedings.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Aug 11, 1998]

Civil Action No. 97-1857
(Caldwell, J.)
(Durkin, M.J.)

MCI TELECOMMUNICATIONS CORP.,
Plaintiff,

v.

BELL ATLANTIC-PENNSYLVANIA, INC., *et al.*,
Defendant.

REPORT AND RECOMMENDATION

Before the court is a motion by the defendants, Pennsylvania Public Utility Commission and its members, to dismiss the complaint for lack of personal jurisdiction, and a motion by the same defendants to dismiss the crossclaim of defendant Bell Atlantic-Pennsylvania, Inc., against them. (Doc. Nos. 7 and 19).

By way of background, The Telecommunications Act of 1998, 47 U.S.C. §§151, *et seq.*, (hereinafter "The Act" or "TA—1996") (Attached as Appendix B) seeks to promote telecommunications services throughout the nation by competition. Interexchange Carriers ("IXCs"), such as MCI, are expected to enter the local markets of Local Exchange Carriers ("LECs") as Competitive Local Exchange Carriers ("CLECs"). Interconnection agreements, arrived at through negotiation and arbitration, play an important part in

promoting that competition. These agreements generally govern the prices, terms, and conditions under which a specific CLEC accesses an ILEC's network.

Sections 252 (a) (2) and (b)) (1)-(4) of the Act authorize state commissions to conduct negotiations, mediations, and arbitration proceedings to facilitate and to resolve any terms, prices, or conditions that a specific CLEC and an ILEC are unable to resolve themselves. Thereafter, the CLEC and ILEC are required to submit the final interconnection agreement (contract) to the state commission for approval under Section 252(e). Section 252 (e) (6) authorizes the judicial review of state commission actions approving any interconnection agreement.

Throughout 1996, plaintiff MCI Communications Corporation and MCI Metro Access Transmission Services, Inc. ("MCI") and Bell Atlantic-Pennsylvania, Inc. ("Bell-Atlantic") engaged in a lengthy, negotiation in an attempt to reach an interconnection agreement. On August 30, 1996, MCI sought compulsory arbitration of unresolved issues before the Pennsylvania Public Utility Commission (PUC). Hearings were held in October 1997 and briefs were submitted by MCI and Bell Atlantic.

On December 20, 1996, the PUC issued a final opinion and order disposing of the arbitration proceedings (December 1996 Order). The December 1996 Order required the submission of an interconnection agreement reflecting the PUC's determinations in the December Order. The December Order also required incorporation of the Commission's determinations in the related proceeding at PaPUC Docket No. A-310203F0002 (the "MFS Phase III" proceeding)

concerning the prices for unbundled network elements ("UNEs") [1] under litigation in that proceeding.[2]

The parties later filed a Joint Application for Approval of an interconnection agreement using the MFS Phase III Interim Rate Order rates. However, the parties could not agree on the appropriate Interconnection Point (IP) for the Philadelphia and Pittsburgh LATAs.[3] The parties requested the Commission to approve the interconnection agreement and determine the number of Ips for the LATAs.

On September 3, 1997, the PUC entered an Order (September 1997 Order) approving the interconnection agreement on the condition that the final rates would be those established by the MFS Phase III Proceeding. The September 1997 Order also adopted Bell's proposed language on the number of IPs. A Secretarial Letter issued on November 14, 1997 deeming the September 1997 Order to be final.

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[1] The three methods to attain some of the goals of the Act are, generally, interconnection, resale, and facilities-based competition. Under interconnection, a CLEC negotiates with an ILEC to obtain the UNEs needed to provide competitive local exchange service to end-user customers through a combination of CLEC-owned components and those secured from the ILEC. Under resale, the CLEC purchases the retail services of an ILEC, at a pre-determined discount established by a state commission, for resale to an end-user customer. Under facilities-based competition, a competitor builds the telephone network needed to provide competitive services to end-users.

[2] MCI and Bell were parties to the MFS Phase III proceeding. On April 10, 1997, the PUC issued an order establishing interim rates (MFS Phase III Interim Order). On August 7, 1997, the PUC issued a final order establishing final rates (MFS Phase III Final Order).

[3] Interconnection Point (IP) is a term of art that refers to the physical connection between two competing carriers. In this case, MCI and Bell disputed the number of points serving the Philadelphia and Pittsburgh areas. MCI thought one point was sufficient whereas Bell wanted at least two.

On December 8, 1997, MCI filed this action against the PUC and its commissioners in their official capacities, and against Bell Atlantic challenging a number of the PUC's determinations which the PUC ordered MCI and Bell Atlantic to include in the interconnection agreement which MCI contends are violative of the Act. The PUC defendants filed a motion to dismiss the complaint for lack of personal jurisdiction. Bell Atlantic filed an answer to the complaint which included a counterclaim against MCI and also filed a crossclaim against the other defendants, also contending that certain actions of the PUC violated the Act. MCI then moved to dismiss Bell Atlantic's crossclaim.

Turning first to the PUC's motion to dismiss the complaint, the documents related to that motion are the PUC's supporting brief and exhibits (Doc. Nos. 8 and 9) ; MCI' s opposing brief (Doc. No. 18), the PUC's reply brief related to both the motion to dismiss, the complaint as well as the motion to dismiss Bell Atlantic's crossclaim (Doc. No. 25); an opposing brief by Intervenor United States in opposition to PUC's motion to dismiss the complaint on' constitutional grounds (Doc. No. 35); MCI's surreply in opposition to defendant's motion to dismiss which addresses the constitutional arguments raised in the PUC's reply brief (Doc. No. 42) and MCI's notice of supplemental authority. (Doc. No. 52).

A central element of the 1996 Act is the introduction of competition into local service markets pursuant to agreements negotiated in accordance Sections 251 and 252 of the Act. Section 251 of the Act imposes a variety of obligations upon incumbent local telephone companies requiring them to provide access to their facilities to new entrants with the aim of hastening the growth of competition in their markets, by permitting other telecommunications carriers to interconnect with the incumbent, thereby allowing calls to carry between an incumbent's network facility and those of a competitor; by

providing other carriers access to elements of the incumbent's local network on an "unbundled" basis, thereby permitting a prospective competitor to repackage elements to be offered to the public as a competitive service; and by selling to other carriers, at wholesale rates, any telecommunications service that the incumbent provides to its retail customers. 47 U.S.C. §251(c). Section 251 also requires incumbent exchange carriers to provide physical access to their poles, ducts, conduits and rights of way to allow other carriers to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. §251(b) (4) and 251(c)(6).

Sections 251 and 252 impose a duty on incumbent local exchange carriers to negotiate in good faith with new entrants to arrive at the terms and conditions of agreements regarding facilities' access, interconnection, resale of services, or any of the other arrangements contemplated by the Act. 47 U.S.C. §251(c), 252. Section 252 provides that the parties may enter into voluntary agreements that become effective upon approval by the responsible state public service commission, or, failing negotiation of a voluntary agreement, that any party to such a negotiation "may petition a state commission to arbitrate any other issues." 47 U.S.C. §252(c). The 1996 Act permits any party "aggrieved" by a determination of a state commission to bring an action in federal district court to determine whether the agreement or statement meets the requirements of Section 251 and Section 252. 47 U.S.C. §252(e)(6).

Although Congress might have preempted the regulatory role under the Act, it gave the states, through their commissions the right to participate in this regulatory role, perhaps on the basis that the states had traditionally participated in the regulation of facilities. However, the Act plainly permits state commissioners to opt out of their regulatory role. If a state declines to accept the regulatory role

contemplated by the statutes, its duties are assumed by the FCC, 47 U. S. C. § 252(e)(5), and there is no judicial relief against the state commissioners' decision to opt out. 47 U.S.C. § 252(e)(6). Review of the FCC's actions in such cases would constitute the sole avenue of judicial redress. *See Id.*, 47 U.S.C. § 402(a); 28 U.S.C. § 2342(2). However, if the commission decides to accept the regulatory role, then as noted above, any party aggrieved by a decision of a state commission may bring an action in federal district court to determine whether the agreement or statement meets the requirements of the Act.

It is this provision for review in a federal court of the commission' s actions which forms the basis for the PUC' s contention that a federal court lacks jurisdiction to review the commission's actions. The PUC argues that the Eleventh Amendment bars suits against an unconsenting state, and an arm of that state such as the PUC, by its own citizens as well as those citizens of another state. The PUC argues that Pennsylvania has not consented to this suit by MCI, a citizen of Delaware and doing business in Pennsylvania and thus the action should be dismissed. In its reply brief, the PUC argues that Section 252(e)(4) to (e)(6) of the Act are unconstitutional because they exceed Congress' powers under the Commerce Clause and also that the Tenth Amendment which reserves to the states the powers not delegated to the United States by the Constitution prohibits Congress' attempt to "commandeer the Commonwealth's legislative and executive functions" by forcing it to waive its sovereignty in order to implement the federal regulatory program of the Act.

However, as the briefs of MCI, the United States and indeed Bell Atlantic in connection with a identical attack on the crossclaim, clearly demonstrate, all of the courts that have addressed the Eleventh Amendment issue have held that the Eleventh Amendment does not bar district court review of state decisions under Section 252 of the Telecommunications

Act either because suit can properly be brought against state officials, such as the commissioners here, for prospective injunctive relief without regard to the Eleventh Amendment, ex Parte Young, 209 U.S. 123 (1908), or because the Act does not impose an obligation on the states, the performance of which is subject to federal court review, but rather offers state regulatory bodies the option of participating in the federal system for regulation of private conduct and only then subjects their determinations to review in the district court, and that in accepting regulatory authority under the Act in full knowledge of the attendant judicial review provisions, Pennsylvania has waived any Eleventh Amendment protections. The briefs of MCI, the United States and indeed, Bell Atlantic, also contain a host of authority that Sections 252(e)(4) to 252(e)(6) of the Act do not exceed Congress' commerce power nor do they violate the Tenth Amendment. Although PUC also argues that the complaint against the individual commissioners should also be dismissed pursuant to the Eleventh Amendment, the opposing briefs clearly establish that any relief here would be prospective injunctive relief, directing the individual commissioners to implement properly the Telecommunications Act in approving the interconnection agreement at issue, and that therefore relief of the nature contemplated against individual officials is wholly consistent with the *ex Parte Young* exception to Eleventh Amendment immunity.

The PUC attempts to avoid this host of authority set forth in the opposing briefs, which have considered and rejected the PUC's various arguments, by culling from various cases language which it feels would support its position or by attempting to distinguish the authorities. However, the briefs of the parties demonstrate that these attempts are without merit.

At oral argument, the PUC offered brief argument in reply. Although recognizing that every one of a great number of

courts when faced with these various issues has rejected the PUC's position, the PUC's reply was that these issues have not been authoritatively decided by the Third Circuit or by the Supreme Court of the United States and therefore the PUC is certainly not precluded from advancing the same arguments. Thus, it appears that the PUC's intent in filing these motions is more to preserve the record so that these issues may be revisited in the future, perhaps by the Third Circuit or the Supreme Court. Under these circumstances, it would only unduly lengthen this report to set forth the many cases that have rejected these very arguments and with which the magistrate judge agrees. Suffice it to say that the opposing briefs establish that the review of the PUC's actions is not barred by the Eleventh Amendment, the Commerce Clause, or the Tenth Amendment. Indeed, subsequent to oral argument, MCI provided the court with even more authority through May 27, 1978 which supports its position in opposition to the motion of the PUC and its commissioners to dismiss the complaint.(Doc. No. 52)

Since the motion of the PUC to dismiss Bell Atlantic's crossclaim is based on the same arguments directed at the MCI complaint, the motion to dismiss the crossclaim should similarly be denied.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT:

the motion by the defendants PUC and its commissioners to dismiss the complaint be denied and the motion by the same defendants to dismiss the Bell Atlantic crossclaim be denied.

/s/ Raymond J. Durkin
RAYMOND J DURKIN
United States Magistrate Judge

Dated: August 10, 1998

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed August 3, 2000]

Civil Action No. 99-5391

BELL ATLANTIC-PENNSYLVANIA, INC.,
Plaintiff,

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Defendants.

MEMORANDUM AND ORDER

Katz, S.J.

Now before the court is the motion to dismiss submitted by defendants the Pennsylvania Public Utility Commission (PUC) and Commissioners John M. Quain, Robert K. Bloom, Nora Mead Brownell, and Aaron Wilson, Jr., as well as the motion for judgment on the pleadings submitted by intervening state senators Vincent J. Fumo, Roger A. Madigan, and Mary Jo White. The motions seek dismissal of this action on the grounds of Eleventh Amendment immunity or, in the alternative, abstention in light of ongoing state court proceedings. In addition, the motions seek to dismiss as untimely the crossclaims of intervenors MCI WorldCom Network Services, Inc. and MCImetro Access Transmission Services, LLC (collectively, Worldcom), and the crossclaims of intervenors AT&T Communications of Pennsylvania, Inc., TCG Pittsburgh, and TCG Delaware Valley, Inc. (collectively, AT&T). Finally, the motions seek dismissal of counts

four and five of plaintiff Bell Atlantic-Pennsylvania's (Bell) complaint, as well as part of Worldcom & AT&T's claims, for failure to state a claim upon which relief can be granted.[1]

Additional intervenors in this action are Sprint Communications Company and the United Telephone Company of Pennsylvania (collectively, Sprint), and the United States. Sprint did not take a position on either motion. The United States intervened for the purpose of defending the constitutionality of the Telecommunications Act of 1996 (TCA).

I. Background

A. Telecommunications Act of 1996

This case involves the provisions of TCA that seek to foster competition in local telecommunications services[2]. *See* 47 U.S.C. §§ 251-52.

> Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying

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[1] The senators' motion fully incorporates the PUC and the Commissioners' motion to dismiss and makes no additional arguments. Accordingly, the court will not address the senators' motion separately; all references in this memorandum to the motion to dismiss, and the arguments therein, also encompass the senators' motion.

[2] "It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp Iowa Utils. Bd.*, 525 U.S. 366, 397, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999).

> calls between switches) that constitute a local exchange network.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Bell, the plaintiff, is an incumbent LEC.

The TCA attacks the regulatory protections that sheltered local telephone monopolies by "preempting all state and local legal barriers to entry into the local telephone market," including the state-sanctioned exclusive franchises formerly enjoyed by incumbent LECs. *Bell Atlantic-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 222 (D. Del. 2000) (citing 47 U.S.C. § 253(a)). Through sections 251 and 252, TCA also attempts to alleviate economic barriers, recognizing that an incumbent LEC's network provides it with a competitive advantage because the cost of constructing a new, wholly redundant network is generally prohibitive. *See, e.g., id.; MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 2000 U.S. App. LEXIS 17739, 2000 WL 1010863, at *2 (7th Cir. 2000). To that end, the TCA subjects incumbent LECs to "a host of duties intended to facilitate market entry" including "the LEC's obligation under 47 U.S.C. §251(c) . . . to share its network with competitors." *Iowa Utils. Bd.*, 525 U.S. at 371. Section 251(c) provides three ways a competitor can gain access to an incumbent LEC's network: "It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'[3]; and it can interconnect its own facilities

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[3] Access to unbundled network elements allows competitors who do not have a fully redundant network to "fill in the gaps of their own network by purchasing pieces" of an incumbent LEC's network. *McMahon*, 80 F.Supp.2d at 223. "These pieces are known as 'unbundled network elements' or 'UNEs.'" *Id.*

with the incumbent's network."[4] *Id.* The TCA also requires an incumbent LEC to allow a competitor to collocate "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. §251(c)(6).

The Act requires that an incumbent LEC and any competitor negotiate an agreement in good faith. *See* 47 U.S.C. § 251(c)(1). During these negotiations, any party may request the state commission that regulates telephone services to mediate. *See id.* § 252(a)(2). In the event that the negotiations fail, the TCA provides that either party may petition the state commission to arbitrate any open issues. *See id.* § 252(b). An agreement encompassing the access methods detailed in section 251(c), whether arrived at privately or through compulsory arbitration, must be approved by the state commission. *See id.* § 252(e)(1). The TCA limits the grounds under which a commission may reject an agreement under federal law and regulations, *see id.* § 252(e)(2), while preserving a state's authority to impose additional conditions that do not conflict with federal law. *See id.* § 252(e)(3) (stating that, notwithstanding section 252(e)(2) but subject to 47 U.S.C. § 253, "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement[.]"). If a state commission fails to act under section 252, the Federal Communications Commission (FCC) will preempt the state commission's jurisdiction and responsibilities over the access agreements[5]. *See id.* § 252(e)(5); *see generally Illinois Bell*,

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[4] "Some competitors, such as cable companies, . . . have existing networks of their own that enable their subscribers to communicate with each other. . . . [However,] a fair agreement with the [incumbent LEC] will be required to enable the new entrant's customers to place calls to, and receive calls from, the [incumbent LEC's] subscribers." *McMahon*, 80 F. Supp. 2d at 223.

[5] A state commission fails to act when it does not respond within a reasonable time to a request for mediation or arbitration or does not complete an arbitration within a specific time period. *See Illinois Bell*, 222

222 F.3d at 329, 2000 WL 1010863, at *2-3 (detailing section 252's procedural scheme); *MCI Telecomm. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *3 (10th Cir. June 20, 2000) (same).

"In any case in which a State commission makes a determination under . . . [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements" of sections 251 and 252. 47 U.S.C. § 252(e)(6). Moreover, "no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement" under section 252. *Id.* § 252(e)(4).

B. The Parties' Challenges to the PUC's Global Order

At the heart of this action is an Opinion and Order entered by the PUC on September 30, 1999 (Global Order). In the Global Order, the PUC addressed the "several interrelated dockets implementing state and federal telecommunications policy in the Commonwealth of Pennsylvania." Global Order at 2 (Compl. Ex. 1). The PUC undertook the proceedings that culminated in its Global Order upon concluding that its previous system of separately adjudicating individual telecommunications cases did not lead to "satisfactory and prompt resolution" of the morass of issues raised by federal and state law mandates to provide consumers with competitive local telecommunications services. *Id.*

The PUC first attempted to settle the outstanding issues by negotiation, but this method failed. Two competing petitions were then filed before the Commission—one supported by Bell and others, and the second supported by Worldcom; A&T; Senators Fumo, Madigan, and White; and others. The

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F.3d at 329, 2000 WL 1010863, at *3 (citing 47 C.F.R. § 51.801(b)). "A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits." *Id.* (citing 47 C.F.R. § 51.801(c)).

Global Order resolved the issues raised by the two petitions, as well as the pending interrelated dockets that were consolidated for that purpose.

The action before this court alleges that several aspects of the Global Order violate federal law[6]. Bell, Worldcom, and AT&T all contend that rates for unbundled network elements (UNE) set by the Global Order violate the TCA[7]. An order entered by the PUC on August 7, 1997, first set permanent rates for access to Bell's UNEs after a proceeding before the Commission commonly referred to as MFS-Phase III. "Numerous, subsequent agreements" incorporated the rates set by the MFS-Phase III Order. Compl. ¶ 22. The Global Order rates replace the MFS-Phase III rates.

Bell also challenges the PUC's authority under federal law to require it to provide unbundled access to switching throughout Pennsylvania and to provide unbundled access to digital subscriber line access multiplexers (DSLAMs)[8]. Bell contends it should not be required, under federal law and regulations, to make these network elements available because failure to provide them would not impair a competitor's ability to provide services and because they are not necessary for a competitor to provide service. In addition, it contends that the PUC failed to engage in the analysis required by the TCA in determining that Bell make these elements available on an unbundled basis.

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[6] As noted *infra*, these and other aspects of the Global Order are being challenged in state court proceedings as well.

[7] In addition, AT&T alleges that the PUC's decision to allow Bell to maintain rates in excess of just and reasonable levels for an additional period of up to one year violates the TCA and federal regulations.

[8] DSLAMs are "devices that allow users to transmit data and voice communications simultaneously over high-speed digital lines." Bell Mem. in Opp. at 4-5.

Finally, Bell challenges the discount wholesale rates for retail services set by the Global Order. While the wholesale discount rates set by a previous PUC decision are generally unaffected, the Global Order increases for one year the discount rate Bell may charge its competitors for retail services in less populated areas of the Commonwealth as part of a "Rural/Residential Promotion."

Bell brings its claims pursuant to the TCA, 42 U.S.C. § 1983, and 22 U.S.C. § 2201(a), and seeks declaratory and injunctive relief. AT&T and Worldcom bring their claims pursuant to the TCA and seek declaratory and equitable relief.

C. Other Proceedings

Two other proceedings are relevant to this action. The first is a challenge by Bell to the Global Order in state court. That action includes the federal claims asserted here, as well as state law claims regarding other aspects of the Global Order. Numerous parties, including most of the intervenors in this action, are participating in the state action. Bell contends that it raised the federal claims in the state court solely as a protective measure; in its petition for review before the Commonwealth Court, it reserved the federal claims pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964)[9].

The second proceeding was a case in the Middle District of Pennsylvania, *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, Inc.*, No. 1:CV-97-1857. Worldcom brought that action, pursuant to the TCA, to challenge an

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[9] An *England* reservation allows a party who has been forced to litigate in state court to reserve its federal claims for federal adjudication. The party informs the state court of the nature of the federal claims, that it does not wish to litigate those federal claims in the state court, and that the party intends, should the state court rule against it on the questions of state law, to return to federal court for disposition of the federal claims. *See Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990).

interconnection agreement with Bell that had been approved by the PUC. That agreement incorporated the UNE rates set by the MFS-Phase III Order. *See id.*, Report and Recommendation, at 3 (M.D. Pa. Aug. 10, 1998) (Worldcom's Brief in Opp. to Mot. to Dismiss, Ex. 8)[10]. The Middle District court held that the PUC was not immune under the Eleventh Amendment, see id., Order (M.D. Pa. Nov. 5, 1998) (Worldcom's Brief in Opp. to Mot. to Dismiss, Ex. 9), and, on June 30, 2000, it denied both the PUC's motion to certify its decision on immunity for interlocutory appeal,[11] *see id.*, Mem. and Order (M.D. Pa. June 30, 2000) (PUC's Reply Brief, Ex. 1), and decided the action on the merits, *see id.*, J. and Mem. (M.D. Pa. June 30, 2000) (Worldcom's Resp. in Opp. to the Mot. for J. on the Pleadings, Ex. 1). On July 20, 2000, Bell filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60 in light of a recently issued decision by the Eighth Circuit that vacated portions of the FCC regulations upon which the Middle District Court relied. *See* Bell's Mot. for Relief from J. Pursuant to Fed. R. Civ. P. 60 and Request for Expedited Consideration (attached to this court's Order of July 24, 2000); *see also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 2000 U.S. App. LEXIS 17234, 2000 WL 979117 (8th Cir. 2000). That motion was denied. *See MCI Telecomm.*, Civ. No. 1:CV-97-1857, Mem. and Order (M.D. Pa. July 25, 2000).

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[10] The magistrate judge's report and recommendation was adopted by the district court. *See MCI Telecomm. Corp. v. Bell*, No. 1:CV-97-1857 (M.D. Pa. Nov. 5, 1998) (Worldcom's Brief in Opp. to Mot. to Dismiss, Ex. 9).

[11] Notwithstanding the PUC's motion, a district court's denial of a claim of Eleventh Amendment immunity is immediately appealable. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 147, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 325 (3d Cir. 1999).

II. Discussion

A. Standard of Review

Because this action is brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the court's standard of review varies. In evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court generally considers only the allegations in the pleadings. *See, e.g., Halstead v. Motorcycle Safety Found., Inc.*, 71 F. Supp. 2d 464, 467 (E.D. Pa. 1999). However, matters of public record, orders, and exhibits attached to the complaint may also be considered. *See id.* The court must accept as true all factual allegations in the complaint, as well as all reasonable inferences that can be drawn therefrom, and construe them in the light most favorable to the plaintiff. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). Dismissal under Rule 12(b)(6) is only appropriate where there is no set of facts that could be proved upon which relief could be granted. *See id.*

On the other hand, the standard to be applied to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) depends on whether the defendant makes a facial or factual challenge. *See Halstead*, 71 F. Supp. 2d at 468. Under either approach, it is generally the plaintiff's burden to prove that jurisdiction exists. *See id.* However, in a facial challenge, where the allegations of jurisdiction in the complaint are disputed, "the factual allegations of the complaint are presumed to be true and the complaint is reviewed to ensure that each element necessary for jurisdiction is present." *Id.* Where the challenge is factual, "any evidence may be reviewed and any factual disputes resolved regarding the allegations giving rise to jurisdiction[.]" *Id.*

The Eleventh Amendment is a jurisdictional bar and may be raised by a motion to dismiss. *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n.2 (3d Cir. 1996). The

doctrine of abstention allows a court to decline to exercise its jurisdiction, *see, e.g., Kentucky W. Va. Gas Co. v. Pennsylvania PUC*, 791 F.2d 1111, 1114 (3d Cir. 1986), and may also be raised by a motion to dismiss. The court concludes that invocation of the Eleventh Amendment constitutes a facial challenge to its jurisdiction, requiring the court to accept as true the factual allegations in the complaint, while invocation of abstention doctrines constitutes a factual challenge, allowing the court to conduct a wider inquiry.

B. Eleventh Amendment

The PUC[12] first seeks dismissal of this action on Eleventh Amendment grounds. That amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although by its literal terms the Eleventh Amendment only prohibits suits against a state by citizens of another state or of a foreign state, the Supreme Court has held that the amendment applies to suits brought against a state by its own citizens, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), and to suits involving state agencies. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993).

State sovereign immunity under the Eleventh Amendment is not, however, absolute, as the Tenth Circuit explained:

> First, a state may not assert an Eleventh Amendment defense where Congress has properly abrogated its immunity. Second, a state may waive its sovereign immunity by consenting to suit in federal court. Third, a

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[12] Unless otherwise indicated, any further references to the PUC encompass both the Commission and the individual Commissioners.

private party may sue a state officer for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws.

Public Serv. Comm'n, 216 F.3d 929, 935, 2000 U.S. App. LEXIS 14348, at *12, 2000 WL 783382, at *4 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999); Ex parte Young, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908); Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)). In *Seminole Tribe*, the Supreme Court held that Congress may only abrogate a state's sovereign immunity when it acts pursuant to its powers under the Fourteenth Amendment. See 517 U.S. at 59, 72-73; *see also College Sav. Bank*, 527 U.S. at 670. Because Congress passed the TCA pursuant to its Article I powers under the Commerce Clause, *see Bell Atlantic-Del. v. Global NAPS S.*, 77 F. Supp. 2d 492, 498 (D. Del. 1999), the parties opposing the motion to dismiss rely on the second and third means of avoiding Eleventh Amendment immunity, arguing that the Commonwealth waived its immunity and that this suit may proceed against the Commissioners under the *Ex parte Young* doctrine.

1. Waiver

Although the constructive waiver doctrine has been severely limited by *College Savings Bank*, the court is persuaded by the decisions of the Seventh and Tenth Circuits that a gratuity constructive waiver is still a viable means by which a state can waive its sovereign immunity. *See Illinois Bell*, 222 F.3d at 339, 2000 WL 1010863, at *13-18; *Public Serv. Comm'n.*, 216 F.3d 929, 935-36, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *5-8. In *College Savings Bank*, the Court overruled *Parden v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184, 12 L. Ed. 2d 233,

84 S. Ct. 1207 (1964), declaring that "the constructive-waiver experiment of Parden was ill conceived. "*College Sav. Bank*, 527 U.S. at 680. *Parden* involved a provision of the Federal Employer's Liability Act (FELA) that allowed suit in federal court for violations of the Act against every carrier engaged in interstate commerce. The Supreme Court held that this provision permitted a federal suit against Alabama because the state had chosen to operate a railway system in interstate commerce, thus waiving its sovereign immunity. *See* 377 U.S. at 192. Similarly, *College Savings Bank* involved the Trademark Remedy Clarification Act, which provided that a state could be sued in federal court for false and misleading advertising in interstate commerce. *See* 527 U.S. at 670. In *College Savings*, however, the Court rejected the argument that Florida had constructively waived its immunity by choosing to engage in an otherwise lawful activity that was regulated by federal law: "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *Id.* at 680.

Several courts, including the Seventh and Tenth Circuits, when considering the question of waiver post-*College Savings Bank*, have relied on language in that opinion suggesting that gratuity constructive waivers have not been foreclosed. *See, e.g., Illinois Bell*, 222 F.3d at 340, 2000 WL 1010863, at *13-18; *Public Serv. Comm'n.*, 216 F.3d 929, 935, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *5-8; AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999); *Global NAPS S.*, 77 F. Supp. 2d at 498-500. Under this theory, if Congress offers the states a gift or gratuity that is not otherwise available to them, Congress may condition a state's acceptance of that gift upon a waiver of its immunity. *See College Sav. Bank*, 527 U.S. at 686-87.

Support for gratuity waivers is found in *College Savings Bank's* approving discussions of *Petty v. Tennessee-Missouri*

Bridge Commission, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959), and *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987). *Petty* held that a bistate commission, created pursuant to an interstate compact, had consented to suit in federal court because Congress' approval of the compact included a provision permitting such a suit. *See* 359 U.S. at 281-82; *see also College Sav. Bank*, 527 U.S. at 686. Because "states cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Sav. Bank*, 527 U.S. at 686. Similarly, *Dole* held that, under its spending powers, Congress could condition its grant of funds upon the states taking certain actions; therefore, acceptance of the funds entailed an agreement to that condition. *See* 483 U.S. at 210-12; *see also College Sav. Bank*, 527 U.S. at 686. "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *College Sav. Bank*, 527 U.S. at 686-87; see also id. at 686 (stating that Petty and Dole are "fundamentally different" from *Parden*).

In applying a gratuity constructive waiver analysis to the TCA, the first issue to be resolved is "whether Congress, in inviting the states to waive their Eleventh Amendment immunity, has done so with sufficient clarity." *Illinois Bell*, 222 F.3d at 340, 2000 WL 1010863, at *15 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)). On this point, the court adopts the Seventh Circuit's comprehensive analysis in *Illinois Bell* concluding that, although the TCA does not contain explicit waiver language, the structure of the statute clearly expresses Congress' intent that "states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at *15.

The second issue is whether a state's decision to regulate pursuant to the TCA constitutes an unequivocal gratuity

waiver of its sovereign immunity. The court joins the Seventh and Tenth Circuits, as well as other district courts, in holding that, because Congress could have revoked a state's authority to regulate telecommunications entirely, a state commission's participation in the TCA's procedures regulating access agreements constitutes a gratuity constructive waiver. Crucial to the Supreme Court's distinction between a *Parden* constructive waiver and a gratuity constructive waiver is whether the state has received a gift or whether it was effectively coerced into waiving its immunity. The Court emphasized that "the point of coercion is automatically passed—and the voluntariness of the waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *College Sav. Bank*, 527 U.S. at 687. While, prior to 1996, regulation of intrastate phone services was left to the states, *see, e.g., Iowa Utils. Bd.*, 525 U.S. at 402-05 (Thomas, J., concurring in part, dissenting in part) (detailing history of federal and local telephone regulation prior to the 1996 Act), the TCA "unquestionably" took away certain aspects of the state's control over local telecommunications, *id.* at 378 n.6, and, "although it did not do so, Congress could have preempted all state regulation of local phone service." *Public Serv. Comm'n*, 216 F.3d 929, 938, 2000 U.S. App. LEXIS 14348, at *23, 2000 WL 783382, at *8 (citing *FERC v. Mississippi*, 456 U.S. 742, 764, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)). As the Tenth Circuit explained,

> with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in Petty and Dole, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a

> state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.

Id.; see also Illinois Bell, 222 F.3d at 344, 2000 WL 1010863, at *17 ("Here, the gratuity is federal regulatory power; the condition is waiver of the state's immunity."); *McMahon*, 80 F. Supp. 2d at 232-33 (holding that state participation in federal telecommunications regulation is a gratuity upon which Congress may condition a waiver of state sovereign immunity); *Global NAPS S.*, 77 F. Supp. 2d at 499 (holding that the utility commission was acting under a grant of federal power when it presided over an interconnection agreement and, in so doing, was accepting the gift of this power in exchange for its waiver of immunity).

The PUC relies upon two district courts decisions that held that the states were not offered a gratuity, but rather were coerced into participating in the federal scheme by the Hobson's choice of either consenting to federal regulation and giving up sovereign immunity or losing their power to regulate local exchange carriers. *See AT&T Communications of the S. Cent. States, Inc. v. BellSouth Communications, Inc.*, 43 F. Supp. 2d 593, 601-02 (M.D. La. 1999); *Bell Atlantic-Md., Inc. v. MFS Intelenet of Md., Inc.*, 1999 U.S. Dist. LEXIS 16477, at *9-10 (D. Md. 1999)[13]. The PUC empha-

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[13] *Illinois Bell*, 222 F.3d 323, 2000 U.S. App. LEXIS 17739, 2000 WL 1010863, reversed a third district court case upon which the PUC relied, *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin*, 57 F. Supp. 2d 710, 715 (W.D. Wis. 1999).

The PUC also argues that, in addition to the two district courts, the Sixth Circuit has rejected the notion of a gratuity waiver. However, the Sixth Circuit, in a footnote, simply acknowledged that *College Savings Bank* generally rejected the notion of constructive waiver, without addressing whether a gratuity constructive waiver survived that decision. *See GTE N., Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000). The

sizes that any condition that requires it to waive its immunity in order to continue exercising its traditional authority to regulate local telephone markets is inherently coercive. However, these cases, and the PUC's position, fail to acknowledge properly that Congress has the power to preempt completely state regulation of telecommunications. "Congress could-and did-take over regulation of a part of the telecommunications industry. . . . Such regulation is no longer an 'otherwise permissible activity' for states. Congress may choose to 'give back' to states some of the regulatory power Congress has taken away, and Congress may attach certain conditions to the return of that power." *Illinois Bell*, 222 F.3d at 344, 2000 WL 1010863, at *18; *see also id.*, 222 F.3d at 343, 2000 WL 1010863, at *17 (The state commissions have conducted arbitrations for interconnection agreements. . . [and] have approved and enforced those agreements . . . under a federal grant of power. Their authority to act was derived from provisions of the Act and not from their own sovereign authority."); *McMahon*, 80 F. Supp. 2d at 233 n.12 ("Because Congress has this undisputed power . . . , continued state regulation in this area following the enactment of the Telecommunications Act is (in the constitutional sense) a gratuity upon which Congress may condition federal court review of state commission actions."). Finally, the PUC argues that only the Commonwealth may waive its immunity and any action by the Commission does not constitute a valid waiver. On this issue, the court again adopts the reasoning of the Seventh Circuit and finds that the Commonwealth has waived its immunity by failing to prevent the Commission from participating in the federal scheme under the TCA. *See Illinois Bell*, 222 F.3d at 344, 2000 U.S. App. LEXIS 17739, at *56, 2000 WL 1010863, at *17 n.10.

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court does not find *Strand* persuasive on the issue of waiver in light of the considered decisions by the Seventh and Tenth Circuits.

2. *Ex Parte Young*

In the alternative, the court finds that even if the Commission is immune, this action may proceed against the individual Commissioners under the doctrine of *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908)[14]. That doctrine operates as an exception to the general rule of state sovereign immunity and allows suits against state officials for prospective injunctive relief to end a continuing violation of federal law. *See id.* at 159-60;[15] *see also Seminole*

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[14] Worldcom argues that this court is collaterally estopped from deciding the PUC's sovereign immunity claim, since the Middle District rejected that argument. *See MCI Telecomm. Corp. v. Bell*, Report and Recommendation (M.D. Pa. Aug. 10, 1998) (finding no Eleventh Amendment immunity because of the PUC's waiver and, alternatively, under *Ex parte Young*); *id.* Order (M.D. Pa. Nov. 5, 1998) (adopting Report and Recommendation).

> Traditionally, four factors must be present before the application of collateral estoppel is appropriate: (1) the previous determination was necessary to the decision; (2) the identical issue was previously litigated; (3) the issue was actually decided in a decision that was final, valid, and on the merits; and (4) the party being precluded from relitigating the issue was adequately represented in the previous action.

Hawksbill Sea Turtle v. Federal Emergency Management Agency, 37 V.I. 526, 126 F.3d 461, 474-75 (3d Cir. 1997).

The Middle District court ruled on immunity prior to *College Saving Bank*, and did not reach the issue of a gratuity constructive waiver, nor were the issues of abstention, which are unique to this case, raised. While the court did address *Ex parte Young*, as far as can be discerned from the record before this court, the Middle District court did not address the remedial scheme limitation of *Seminole Tribe*, discussed infra.

[15] While the PUC argues that the doctrine only applies when Constitutional rights are violated, numerous cases have recognized that the doctrine extends to violations of federal law. *See e.g., Green v. Mansour*, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law"); *Allegheny County Sanitary Auth. v. United States EPA*, 732 F.2d 1167,

Tribe, 517 U.S. at 73. The Sixth, Seventh, and Tenth Circuits have all found that Ex parte Young allows actions under section 252 to proceed against individual commissioners. *See Illinois Bell*, 222 F.3d at 336, 2000 WL 1010863, at *18-21; *Public Serv. Comm'n*, 216 F.3d 929, 939, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9; see also *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000) (holding that application of section 252 against the individual commissioners of the Michigan Public Service Commission "is a straightforward *Ex parte Young* case"; noting that most district courts have held the same).

The PUC, however, argues that *Seminole Tribe*'s remedial scheme limitation of *Ex parte Young* applies with equal force to the TCA. In *Seminole Tribe*, the Court cautioned that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based on *Ex parte Young*." 517 U.S. at 74. The statutory scheme at issue in *Seminole Tribe* was the Indian Gaming Regulation Act, that, inter alia, set forth a process by which states and tribes were to negotiate a tribal-state compact governing the conduct of gaming activity by the tribe. See id. at 48-49. States were required to negotiate in good faith, and the Act provided that a tribe could bring suit in federal district court if the state failed to do so. *See id.* at 49-50. If the court found for the plaintiff tribe, the Act's elaborate remedial scheme required the court to order the parties to conclude a compact within sixty days. If the parties failed to do so, the court was to appoint a mediator who would select one of the proposals submitted by the parties. The state was required to accept the compact selected by the mediator within sixty days,

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1174 (3d Cir. 1984) ("When federal statutory law has been violated, federal courts may grant an injunction for prospective relief against state officials[.]").

and, if it failed to do so, the Secretary of the Interior was to prescribe the procedures under which the tribe could conduct gaming on its reservation. *See id.* at 50, 74. Thus, in contrast to the "full remedial powers" available under *Ex parte Young*, the Act only provided for a "quite modest set of sanctions" against an uncooperative state. *Id.* at 75; *see also id.* ("It is difficult to see why an Indian tribe would suffer through the intricate scheme of [the Act] when more complete and more immediate relief is available under *Ex parte Young*."). The Court held that because Congress chose "to impose upon the State a liability that is significantly more limited than would be the liability imposed on the state officer under *Ex parte Young*," the tribe could not proceed against Florida under that doctrine. *Id.* at 75-76.

Unlike the Indian Gaming Regulation Act, section 252 does not impose an elaborate remedial scheme upon a reviewing court; in fact, the statute fails to specify any particular relief. *See Illinois Bell*, 222 F.3d 323, 2000 U.S. App. LEXIS 17739, 2000 WL 1010863, at *19-20 (holding that section 252(e)(6) does not indicate how a court is to enforce its ruling and that, therefore, *Seminole Tribe* does not preclude application of *Ex parte Young* against individual commissioners); *McMahon*, 80 F. Supp. 2d at 234 (holding that the TCA "is silent as to how federal district courts should enforce their rulings, thus implying that they enjoy the full panoply of remedies allowable in a *Young* suit"); *Southwestern Bell*, 86 F. Supp. 2d at 947-48 (holding that the TCA's provision for federal judicial review is far simpler than the Indian Gaming Regulation Act's detailed remedial scheme). The PUC contends that because section 252 only allows a federal court to determine whether or not an access agreement meets sections 251 and 252 of the TCA, a court's power to prescribe remedies is curtailed. However, section 252 only limits a district court's scope of review, it does not render the TCA vulnerable to *Seminole Tribe*'s remedial scheme limitation.

Thus, the court joins with the Sixth, Seventh, and Tenth Circuits in holding that this action may proceed against the individual commissioners for prospective injunctive relief. [16]

C. Abstention

The PUC argues that if this court does not dismiss the action under the Eleventh Amendment, it should nevertheless abstain. In support of its argument, the PUC invokes a plethora of doctrines—namely abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943), *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), *Railroad Commission v. Pullman*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). The PUC faces a heavy burden of persuasion that abstention is appropriate under any of these doctrines:

> Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or state agency will have the opportunity to decide the matters at issue. The doctrine, born out of a concern for the maintenance of our federal system, represents an extraordinary and narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. Abdication of the obligation to decide cases can be justified

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[16] The court rejects the PUC's remaining arguments. The PUC's contention that the suit cannot proceed against the individual commissioners because the Commission is the real party in interest ignores the fiction of *Ex parte Young*. Its argument that the Commission is an indispensable party is similarly unpersuasive. The PUC's policy argument that application of *Ex parte Young* will turn state administrative appeals into federal cases and flood the federal courts ignores the fact Congress essentially provided for just such a review structure in the TCA.

> under this doctrine only in the exceptional circumstances where the order to the parties to repair to State court would clearly serve an important countervailing interest.

Kentucky W. Va. Gas Co., 791 F.2d at 1114 (citations, punctuation omitted).

1. The Question of Exclusive Federal Jurisdiction

The United States and AT&T contend that this court has exclusive jurisdiction over the federal challenges to the Global Order, relying on sections 252(e)(4) and 252(e)(6). The question of whether a state court may even hear the federal claims is relevant in determining whether any of the abstention doctrines may be invoked.

As noted previously, section 252(e)(4), entitled "Schedule for decision," provides that "no State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). Section 252(e)(6), entitled "Review of State commission actions," provides that "in any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).

By its terms, section 252(e)(4) appears to vest exclusive federal jurisdiction only over a state commission's approval or rejection of an agreement. Arguably, the Global Order does not fit within this narrow frame since it does not specifically approve or reject an agreement between an incumbent LEC and a potential competitor.[17] However, two considerations counsel against interpreting section 252(e)(4) so narrowly. First, it is undisputed that the Global Order sets rates that will

[17] The PUC has not argued that this court does not have jurisdiction pursuant to section 252(e)(6).

be incorporated into future access agreements. Thus, even if a state court has jurisdiction over the federal claims implicated by the Global Order, once the rates are incorporated into an agreement, only a federal court would have jurisdiction over these claims. Since the TCA allows a state commission to consolidate its proceedings under section 252 in order to reduce administrative burdens, *see* 47 U.S.C. § 252(g), it appears contrary to the review scheme of section 252(e) to conclude that a state commission's decision in a consolidated proceeding may be reviewed by a state court, but a decision in separate proceedings may not be. Second, reading section 252(e)(4) in conjunction with 252(e)(6) suggests that the grant of federal jurisdiction under 252(e)(6) should be construed to be equivalent to the exclusion of state jurisdiction under section 252(e)(4). *See Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999); *see also id.* at 571 (holding that when read in conjunction, sections 252(e)(6) and (e)(4) should be interpreted to mean "that Congress envisioned suits reviewing 'actions' by state commissions and that those suits were to be brought exclusively in the federal courts."); cf. *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 480 (5th Cir. 2000) ("We conclude that federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements.").

The court, however, declines to decide at this time whether its jurisdiction over the federal challenges to the Global Order is exclusive because other factors necessary to the exercise of each abstention doctrine invoked by the PUC are not present. Thus, even without deciding the question of whether there is exclusive federal jurisdiction over the federal aspects of Global Order, the court finds that none of the abstention doctrines applies.

2. Abstention Doctrines

a. *Burford*

Burford abstention avoids needless conflict with a state's administration of its own affairs. Under this type of abstention, "where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies" when one of two factors is met: there must be "'difficult questions of state law bearing on policy problems of substantial public import'" or "the 'exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (quoting *Colorado River*, 424 U.S. at 814)) (NOPSI)[18]. There are no questions of state law before this court; nor would a decision in this forum disrupt the state's efforts to establish a coherent policy under state law, given the TCA's clear intent to inject certain federal standards and federal oversight into state regulation of local services. *See Zablocki v. Redhail*, 434 U.S. 374, 380 n.5, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978) ("There is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."). Therefore, *Burford* abstention is not appropriate in this action.

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[18] The first point of analysis is whether there is timely and adequate review in the state court, for "only if [the court] determines that such review is available, should it turn to the other issues." *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 104 (3d Cir. 1999) (citation, punctuation omitted); *see also id.* at 108 (holding *Burford* abstention is inappropriate when the federal court has exclusive jurisdiction over at least some of the claims). Because this court declines to decide whether it has exclusive jurisdiction over the parties' challenge to the Global Order under the TCA, it addresses the other issues.

b. *Younger*

Younger abstention, which is rooted in concerns of comity and federalism, requires that federal courts refrain from hearing constitutional challenges to state action under certain circumstances in which the federal action is regarded as an improper intrusion on the right of a state to enforce its own laws in its own courts. "Three requirements must be met before *Younger* abstention is appropriate: (1) there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere, (2) the state proceedings must implicate important state interests, and (3) the state proceedings must afford an adequate opportunity to raise the constitutional claims." *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996). *Younger* abstention does not extend to a state judicial proceeding reviewing legislative or executive action, as is the case here. *See NOPSI*, 491 U.S. at 368. In *NOPSI*, the Court contrasted these types of actions with "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions" in which *Younger* abstention might be appropriate. *Id.* The Court held that a state court action in which a decision of a rate-making body was being challenged was "no more than a state court challenge to completed legislative action" and not a proceeding that would require *Younger* abstention. *Id.* at 373; *see also id.* ("There is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts."). Here too, a decision in this court will not affect the state court's ability to perform its judicial functions: the action in the Commonwealth court is simply a challenge to a decision of the state's rate-making body. *Younger* abstention does not apply.

c. *Pullman*

A federal court should abstain under *Pullman* and avoid deciding a federal constitutional question if the case may be disposed in state court on questions of state law. "As a matter of law, *Pullman* abstention requires the following special circumstances: (1) uncertain issues of state law underlying the federal constitutional claim; (2) state law issues subject to state court interpretation that could obviate the need to adjudicate or substantially narrow the scope of the federal constitutional claim; and (3) an erroneous construction of state law by the federal court would disrupt important state policies." *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101, 106 (3d Cir. 1996) (citations omitted); *see also Stretton v. Disciplinary Bd. of the Superior Ct.*, 944 F.2d 137, 140 (3d Cir. 1991) (same). If all three circumstances are present, the court should make a discretionary decision, based on equitable considerations, whether abstention is appropriate under the circumstances. *See Presbytery of N.J.*, 99 F.3d at 106. These considerations include "the availability of an adequate state remedy, the length of time the litigation has been pending, and the potential impact on the parties caused by delay in obtaining a state ruling." *Stretton*, 944 F.2d at 140.

Here, at least two of the circumstances necessary for an exercise of *Pullman* abstention are not present because there are no state law issues underlying the federal constitutional claims and because this action does not raise any state law claims. Admittedly, the Global Order was decided under both state and federal telecommunications law, and, arguably, the state court's decision of the state law aspects of the Order could affect the rates and determinations at issue here. In fact, as Bell conceded at the hearing, one of the forms of relief it seeks from the state court, invalidation of the entire Global Order, would render this case moot. However, that con-

sideration alone is insufficient to allow Pullman abstention and, accordingly, the court will not abstain under that doctrine[19].

d. *Colorado River*

While the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" by Congress, *Colorado River* abstention provides for some extremely limited circumstances where considerations of "wise judicial administration" allow a federal court to defer to pending state proceedings in order to avoid duplicative litigation. 424 U.S. at 817. As a threshold matter, the two actions must be parallel; cases are generally parallel when they involve the same parties and claims. *See Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). Factors that can support *Colorado River* abstention include: "(1) whether the state court assumed in rem jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums." Ryan, 115 F.3d at 196 (citing *Colorado River*, 424 U.S. at 818-19). In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), the Supreme Court identified two other factors: whether the state court would adequately protect the rights at issue and whether state or federal law provides the rule of decision. *See id.* at 25-27. With regard to the latter factor, "the presence of federal law issues must always be a major consideration weighing against" abstention. *Id.* at 25-26.

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[19] Furthermore, even if all the *Pullman* factors were present, the court would exercise its discretion and not abstain: it is an open question whether the state court can provide an adequate remedy regarding the federal claims and any delay in eliminating barriers to competition in local telephone markets is against the public interest.

However, no one factor is determinative, and "only the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 818-19.

Even assuming that the proceedings before the state court and this court are parallel within the meaning of *Colorado River*, none of the other factors favor abstention. The PUC relies primarily on the need to avoid piecemeal litigation and the presence of state law issues in advocating for *Colorado River* abstention. However, avoidance of piecemeal litigation only counsels in favor of abstention when there is an articulated congressional policy against piecemeal litigation. *See Ryan*, 115 F.3d at 198. In the context of the TCA, there is no such articulated policy. In fact, the statutory scheme, which envisions exclusive federal jurisdiction over some matters, while preserving a state's authority to act, consistent with the TCA, suggests that Congress intended the very opposite result. *Compare* 47 U.S.C. § 252(e)(6) (providing for federal jurisdiction over determinations of a state commission), *with id.* § 253(b) ("Nothing in this section shall affect the ability of a State to impose . . . consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."). Moreover, the *Cone* factors counsel against abstention since this case is to be decided under federal, not state, law and, as noted previously, there is a serious question as to whether the state court can address the federal claims. Application of *Colorado River* abstention is inappropriate.

D. Dismissal of Claims Pursuant to Rule 12(b)(6)

The PUC argues that Worldcom and AT&T's crossclaims must be dismissed as untimely because Rule 1512 of the Pennsylvania Rule of Appellate Procedure applies to any challenges to the Global Order. That rule provides for a thirty-

day period in which to file a petition for review, and an additional fourteen-day period in which to file a cross petition. The PUC, however, fails to make any compelling argument why Pennsylvania's rules of appellate procedure should apply to this action, which is brought under federal law. Because the TCA does not specify any statute of limitations, the federal default statute of limitations of four years is applicable to this cause of action. *See* 28 U.S.C. § 1658. The court is not unsympathetic to the PUC's position that four years is far too long a window to allow challenges to access agreements. However, such an argument should be directed to Congress rather than to this court. The claims made by Worldcom and AT&T are timely.

The PUC also contends that the claims brought by Bell, Worldcom, and AT&T that invoke an arbitrary and capricious standard must be dismissed for failure to state a claim, arguing that this is not the correct standard of review and that Bell, Worldcom, and AT&T have impermissibly imported the arbitrary and capricious standard from the Administrative Procedure Act. This argument is premature. The merits of the telecommunications companies' challenge to the Global Order are not yet before the court, and accordingly, the court will defer a decision on the appropriate standard of review to be employed. This portion of the PUC's motion is denied without prejudice.

Similarly, the court will deny without prejudice the portion of the PUC's motion that seeks to dismiss Bell's claim under 42 U.S.C. § 1983. The PUC has failed to demonstrate that there are no set of facts upon which relief could be granted.

III. Conclusion

This action is not barred by the Eleventh Amendment because PUC has waived its sovereign immunity. In the alternative, the case may proceed against the individual commissioners under *Ex parte Young*. None of the doctrines

invoked by the PUC require the court to abstain. The PUC's motion to dismiss AT&T and Worldcom's crossclaims as untimely is denied. The PUC's motion to dismiss the portions of Bell, AT&T, and Worldcom's claims that invoke an arbitrary and capricious standard, and the PUC's motion to dismiss Bell's 42 U.S.C. § 1983 claim, are denied without prejudice.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-5391

BELL ATLANTIC—PENNSYLVANIA, INC.,
Plaintiff,

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Defendants.

ORDER

AND NOW, this 3rd day of August, 2000, upon consideration of defendants the Pennsylvania Public Utility Commission and the individual Commissioners' Motion to Dismiss (doc. no. 30), and intervening Senators Fumo, Madigan, and White's Motion for Judgment on the Pleadings (doc. no. 46), the responses, and reply thereto, and after a hearing, it is hereby ORDERED that the motions are DENIED.[1]

BY THE COURT:

MARVIN KATZ, S.J.

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[1] Those portions of the motions that seek to dismiss counts four and five of the complaint, as well as to dismiss the portions of the crossclaims that invoke an arbitrary and capricious standard of review, are denied without prejudice.